Supreme Court, U.S.
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NO. 93-1184

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF OHIO,

Petitioner,

vs.

CHERYL LESSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ohio Supreme Court's holding that respondent's burning of an American flag at a political demonstration to express a political view was expression protected by the First Amendment of the United States Constitution and could not form, in whole or part, the basis of respondent's criminal conviction, merely followed this Court's holding in Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989)?

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DECISIONS BELOW

Please refer to page two of petitioner's brief.

JURISDICTION

Please refer to page two of petitioner's brief.

CONSTITUTIONAL AND STATE RULE PROVISIONS INVOLVED

Please refer to page two of petitioner's brief.

STATEMENT OF THE CASE

On August 10, 1990, Cheryl Lessin, (hereafter "respondent"), spokesperson for the Cleveland branch of the Revolutionary Communist Party, attended, spoke at and participated in one of the first demonstrations called to protest the deployment of United States troops to the Persian Gulf. This was one of the first demonstrations in the nation against the government's preparation for war against Iraq. The purpose of the demonstration was to oppose the government's attempt to shape public opinion to justify the war, and to mobilize opposition to the war.

At this demonstration, respondent criticized the United States government and burned an American flag. Respondent's burning of the flag symbolized her opposition to the war and her belief that the government and the system it enforces are oppressive.

Shortly after the flag was burned, Cleveland police officer, George Deli, arrived at the demonstration, and stated to his partner, "[s]he admitted she burned the flag. Arrest her." (Tr. 274).

Six days after her arrest, the Cuyahoga County Grand Jury indicted respondent for Inciting to Violence, in violation of R.C. 2917.01.

Respondent entered a not guilty plea at her arraignment. Prior to trial, defense counsel filed two motions seeking dismissal of the charge on the grounds

that R.C. 2917.01, both on its face and as applied to respondent, unconstitutionally infringed upon her right to freedom of expression guaranteed by the First Amendment to the United States Constitution. The trial court denied these motions.

On October 22, 1990, respondent's trial commenced.

At trial, Cleveland Police Officers Deli and Sowa testified for the prosecution. The defendant, a fellow demonstrator, and a news reporter testified for the defense. Three video tapes of the demonstration (submitted as joint exhibits) were played for the jury.

The evidence established that several local activist groups planned a demonstration for August 10, 1990 to protest the government's decision to deploy troops in the Persian Gulf. Respondent agreed to speak at the demonstration for the Cleveland branch of the Revolutionary Communist Party.

On August 10, 1990, twelve (12) to twenty (20) persons demonstrated at Public Square in downtown, Cleveland. Several of the demonstrators displayed signs stating their disagreement with the government's policy.

Respondent spoke to the crowd about her opposition to U.S. military involvement in the Persian Gulf. (Tr. 396). During her speech, several passersby verbally challenged the demonstrators and one man

called respondent a "commie slut", "bitch" and "whore". (Tr. 404).

Subsequently, a demonstrator produced an American flag and suggested that it be burned in political protest. An onlooker grabbed the flag to prevent it from being burned. A tussle over the flag ensued. Respondent recovered the flag and proceeded to burn it. (Tr. 410).

The state's case can be summarized by the following testimony of Officer Deli:

Q. What was your personal reaction to hearing the flag had been burned?
A. Do you mean what I felt inside, sir?
Q. Yes, sir.
A. I found it to be very repulsive.
Q. Were you angry?
A. Yes, sir. (Tr. 264)

. . . .

Q. You determined in three minutes that even though she was assaulted, even though she was expressing her opinion by speaking and even though she had burned the flag, that it was her fault and you were going to arrest her; is that correct, all in three minutes?
A. Yes, sir. (Tr. 286)

. . . .

Q. Now, did you hear Ms. Lessin say "Go and assault someone?"
A. No, sir.
Q. Did you hear her say "Commit violence against these other people in the crowd?"
A. No, sir.

Q. Did she urge anyone to punch someone?
A. No, sir.
Q. Did she urge the people to burn down Terminal Tower?
A. No sir.
Q. Okay. Now according to the charge that she was indicted for, she urged or incited someone to commit an offense of violence. Do you know that?
A. Yes, sir.
Q. Okay, who did she urge to commit an offense of violence?
A. By her actions, sir?
Q. No. No. Whom did she urge to commit an act of violence?
A. The crowd, sir.
Q. She urged the entire crowd to commit violence?
A. She was working them up into a frenzy, sir.
Q. Is it your answer that she urged the entire crowd. Did she tell the entire crowd to commit an offense of violence. In other words that - - I'll withdraw the question.
Did she give a speech telling the crowd to commit some acts of violence?
A. No, sir. She didn't give any speech at all.
Q. Did she use any words to urge the crowd to commit an act of violence?
A. Yes, sir.
Q. Okay. What were those words?
A. The words were, "Fuck the United States. I hate this country. Long live the Revolutionary Communist Party." Words like that, sir.
Q. Okay. So it was your understanding or it was your interpretation as an officer of the Cleveland Police Department that

her saying those words was inciting this crowd to violence; is that correct?
A. That is correct, sir.
Q. And her burning of the flag also incited the crowd to violence; is that correct?
A. That's correct sir. (Tr. 276-278)

None of the persons whom the state asserts in its petition that respondent assaulted testified at the trial. The testifying officers were unable to identify any of the purported victims. Moreover, several other police officers present at the scene during the entire demonstration never arrested respondent, nor did they interfere with the demonstration. (Tr. 260)

Respondent denied running through the crowd and yelling, flailing her arms, shoving people or punching people. She stated that she burned the flag, and criticized the government's plans to wage war on the Iraqi people.

Environmental activist and fellow demonstrator, Alana Myers, and Jack Hagan, a news reporter for The Plain Dealer, Cleveland's daily newspaper, testified they were present from the beginning of the demonstration through the arrest, and that they never saw the respondent run through the crowd pushing and punching people. Hagan testified as follows:

Q. Do you know what the protest was about?
A. It was about the United States involvement in the Middle East.

(Tr. 362)

. . . .

Q. Do you know who that demonstrator was?
A. It was the defendant, Ms. Lessin, if I recall correctly.
Q. Do you recall what she was saying over the sound system?
A. When I first observed her, she was reading from a statement, which seemed to pretty much decry our involvement in the Middle East and state that we shouldn't be there basically.
Q. Were you there until Ms. Lessin was arrested?
A. Yes, I was.
Q. Okay, at any time now, was your attention focused on Ms. Lessin most of the time?
A. Most of the time.
Q. Okay. Did you see her running through the crowd flailing her arms, punching people and shoving people?
A. No. I didn't see that.
Q. Did you see her punch anyone.
A. Not while I was watching her.
Q. Did you see her push anyone?
A. Not anytime that I was watching her.
Q. Did you see her flailing her arms like this (indicating)?
A. During the tussle over the flag, she may have flailed her arms.
Q. Okay.
A. But that would have been the only time that I observed her in that kind of position.
Q. Did you hear her urge anyone to commit any offense of violence?
A. Not while I was there.

Q. Did you hear her use either her own voice or the sound system to urge people to punch each other?
A. No, I didn't. (Tr. 364-365)

. . . .

Q. What did you see him do? (referring to Deli)
A. He sort of just walked right directly into the crowd and came up to the defendant and said, "You are under arrest." And she said, "What for?" And he said, "For burning the flag." And she then began to shout some things. I'm not sure exactly what about, "You can't arrest me," or something like that.
Q. And at any time that you saw Officer Deli there, did you see punching and shoving and a near riot situation in the crowd?
A. I didn't see any punching and shoving. There was a lot of people over pulling and tugging over the flag. I don't know how you want to characterize that. The only punching or shoving that I saw was at one point, one of the demonstrators was slapped in the face. That was the only physical contact that I witnessed.
Q. What was the reaction of the person who was slapped in the face?
A. She, at that point was very close to the person who slapped her and continued to stay close to her and looked at her in the face and continued to try to make her point. (Tr. 371-372)

. . . .

Q. The activity that she partook in that day, in your mind, you believe she was only exercising the right to free speech?
A. Yes.
Q. I'm asking you is that what you believe?
A. Yes.
Q. Unequivocally, she was expressing her right to free speech, no more, no less?
A. She was expressing her right to free speech and I support that. (Tr. 377)

The officers' testimony that the demonstration had turned into a "near riot" must be measured against their personal disgust for respondent's burning of the flag, the non-intervention by the other police officers at the scene, the testimony of three defense witnesses who saw only a heated political demonstration, the failure of the state to produce as witnesses or to even identify the victims of the purported assaults, including, but not limited to the elderly woman who was purportedly knocked down by the crowd, or any witnesses who saw the purported assaults or "near riot," and the absolutely unbelievable testimony that the "near riot" occurred just as the T.V. crews were preparing to leave the scene, and the T.V. reporters apparently decided not to report on the "near riot." (Tr. 264, 276, 277, 278).

The trial court's jury instructions ignored the law enumerated by Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), failed to safeguard against the possible conviction of respondent for engaging in expression

protected by the First Amendment to the United States Constitution, and permitted respondent's conviction based on the hostile reaction of some onlookers to her political expression.

On one occasion, the trial judge misinformed the jury, when she informed the jury, "The objection is sustained. There has been no Supreme Court case, to my knowledge, that permits under any circumstances that it's okay to burn the flag." (Tr. 91-92) (Emphasis added)

Respondent submitted a proposed jury instruction on the issue of First Amendment protection, part of which was rejected by the trial judge. The rejected portion reads:

> "The First Amendment protects free speech. The state cannot prosecute someone for exercising her right to free speech. The law applicable to this case is that speaking & burning the flag are protected speech and are protected by the First Amendment & the defendant cannot be convicted for such activity."

The jury received the case on October 24, 1990. Three days later, after informing the court three times that it was hopelessly deadlocked, the jury returned a guilty verdict.

On April 23, 1992, in a two to one decision, the Ohio Court Of Appeals, Eighth Judicial District, affirmed respondent's conviction.

Respondent appealed her conviction to the Ohio Supreme Court. On October 27, 1993, in a four to three decision, The Ohio Supreme Court reversed respondent's conviction. In a narrow opinion in which it addressed only one of respondent's six assigned errors, the Ohio Supreme Court held that the trial court's failure to charge the jury in such a manner as to ensure that respondent's conviction was not premised, in whole or part, upon constitutionally protected political expression mandated reversal of respondent's conviction.

This matter comes before this Court on a Petition for Writ of Certiorari to the Supreme Court Of Ohio seeking review of that court's October 27, 1993 reversal of respondent's conviction.

ARGUMENT

I. THE OHIO SUPREME COURT'S RULING DOES NOT UNCONSTITUTIONALLY ABRIDGE THE STATE'S LEGITIMATE GOVERNMENTAL INTEREST IN PREVENTING BREACHES OF THE PEACE.

In Texas v. Johnson, 491 U.S. 397, 404, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342, 353, this Court stated:

"The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word. While we have rejected 'the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea,' United States v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672, 679 (1968), we have acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments,'" Spence v. Washington, 418 U.S. 405, 409, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842, 846.

"In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '(a)n intent to convey a particularized message was present, and (whether) the likelihood was great that the message would be understood by those who viewed it.'" 418 U.S. at 410-411, 94 S.Ct. at 2730."

In this case, respondent's burning of the American flag was intended to express her disgust with the government's foreign policy in the Persian Gulf.

It was clearly an act of political expression taken at a political demonstration. Those who viewed her burning of the flag clearly understood that it was being done to convey a political message.

Thus, as a matter of law, respondent's burning of an American flag at the political demonstration is "sufficiently imbued with elements of communication," and is protected expression under the First Amendment. Such conduct simply does not provoke an immediate violent response by the average onlooker, and is protected expression under the First Amendment.

The State's reliance upon United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) is misplaced. The State argues that under O'Brien, when speech and nonspeech elements are intertwined, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." Id. at 376, 672, and 1673.

This case is clearly distinguishable from O'Brien. O'Brien engaged in one act, burning his selective service certificate. This one act involved both speech and non-speech elements, which were intertwined.

In O'Brien, the Court determined that the regulation disallowing the destruction of the selective service certificate was within the government's constitutional power, that it furthered an important or substantial governmental interest, which interest was unrelated to the suppression of free speech, and that any incidental restriction on First Amendment freedoms resulting from the regulation was no greater than that necessary to further the governmental interest.

The destruction of the certificate was the only act the government sought to regulate. Thus, its protection of the certificate was no greater a restriction on First Amendment freedoms than was necessary to further the governmental interest.

In contrast, respondent engaged in several different forms of expression. She burned the American flag, criticized the government's policy as to the Persian Gulf War, and expressed allegiance to the Revolutionary Communist Party. She was arrested, at least in part, for engaging in these protected acts, which arrest was a much greater restriction on her First Amendment freedoms than was necessary to further the governmental interest to maintain the peace.

The state argues that where flag burning results in a violent response from a hostile audience (ie. breaches of the peace), the arrest of the flag burner is an incidental restriction on the First Amendment freedom (ie. flag burning)

necessary to promote the government interest of maintaining the peace. Protected speech may be punished if it is subject to a hostile audience.

In other words, it matters not that respondent may have been involved in political expression. If the political expression is not popular and results in a hostile audience reaction, then the proper approach is to arrest the person engaging in the political expression.

Or worse, the government need only allege the existence of a hostile reaction to stifle expression with which it does not agree. From such dangerous legal positions may police states emerge.

When confronted with a similar legal argument, this Court responded:

"The state's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that expression may be prohibited on that basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal function of free speech under our system of government is to invite dispute. **It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions, as they are, or even stirs people to anger."**

Texas v. Johnson, 491 U.S. 397, 409-410, 109 S.Ct. 2533, 2541, 105 L.Ed.2d 342, 356

(1989), quoting Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). See also, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 508-509, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); Cox v. Louisiana, 379 U.S. 536, 551, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965).

This Court specifically rejected the idea "that the Government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence." Texas v. Johnson, supra.

The First Amendment protects both popular and unpopular expression. Thus, a hostile audience reaction to unpopular expression cannot serve as a basis for a criminal conviction. Texas v. Johnson, supra, at 2542; Gregory v. Chicago, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969); Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 687 (1963).

The Ohio Supreme Court's holding does not unconstitutionally abridge the state's legitimate government interest in preventing breaches of the peace.

Instead, the narrow holding merely follows this Court's pronouncement in Texas v. Johnson, supra.

II. THE OHIO SUPREME COURT'S HOLDING DOES NOT ELIMINATE JURORS' ABILITIES TO CONSIDER THE ACTUAL CIRCUMSTANCES OF A PROSECUTION FOR INCITING TO VIOLENCE.

The Ohio Supreme Court's holding does not eliminate jurors' abilities to consider the circumstances of a prosecution for inciting to violence. Instead, the holding simply ensures that where, as here, these circumstances involve both protected and unprotected expression, the trial court must instruct the jury that a conviction cannot be based on the protected expression. Street v. New York, 394 U.S. 576, 588, 89 S.Ct. 1354, 1363-1364, 22 L.Ed.2d 572, 582-583 (1969).

Respondent's political expression constituted most of the circumstances resulting in her prosecution. Thus, the trial court was under a duty to ensure that her conviction did not result from the jury's consideration of the protected expression. To fulfill this duty, the trial court should have instructed the jury that it could not consider the protected expression as criminal. Id.

Thus, the jury could consider the circumstances resulting in respondent's prosecution, but it could not convict respondent based on those circumstances which involved respondent's constitutionally protected expression. Id.

III. THE OHIO SUPREME COURT'S NARROW HOLDING DOES NOT EXPAND THIS COURT'S HOLDING IN TEXAS V. JOHNSON.

The Ohio Supreme Court held that respondent's burning of the American flag at a political demonstration to communicate a political belief was expression protected under the First Amendment to the United States Constitution, which expression could not form the basis for respondent's criminal conviction.

Such is not an impermissible expansion of Texas v. Johnson, supra, and consistent with Street v. New York, supra.

CONCLUSION

The sad reality is that the state prosecuted respondent for burning an American flag, an act of political expression with which the state took exception.

The state advances a legal position in its petition designed to permit it to stifle future political expression which it finds undesirable. Such state sanctioned oppression is dangerous, and must be rejected by this Court.

As Justice Jackson warned in West Virginia State Bd. Of Edu. v. Barnette, 319 U.S. 624, 641, 63 S.Ct. 1178, 87 L.Ed. 1628, 1638 (1943),

"Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."

. . . .

"It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. ... Authority here is to be controlled by public opinion, not public opinion by authority."

For the foregoing, respondent requests that this Court deny the state's Petition For Writ Of Certiorari To The Ohio Supreme Court.

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